Supreme Court, U.S.
FILED
No. (1) 6 21 OCT 17 1995
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

IN RE: SOUTHEAST BANKING CORP. SECURITIES LITIGATION

WILLIAM A. BRANDT, JR., AS ADMINISTRATOR OF THE INVESTMENT PLUS PLAN OF THE SOUTHEAST BANKING CORPORATION,

Petitioner,

—v.—

HARVEY WEINER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether in a Rule 23(b)(3) class action—absent Rule 24 intervention—an unnamed class member, who follows the procedures set forth in a Rule 23(e) settlement notice and properly objects to a settlement, has standing to appeal the district court's order approving the settlement over his timely objection.

Rule 29.1 Listing

Pursuant to Rule 29.1 of this Court's Rules, petitioner William A. Brandt, Jr., as Administrator of the Investment Plus Plan (the "Plan"), a pension plan for former employees of Southeast Banking Corporation and its affiliates, hereby submits the following list of subsidiaries of Southeast Banking Corporation:

Financial Carriers, Inc.
First Development Corp. of Jacksonville
First National Bank of Palm Beach, Incorporated, The
First Pioneer Corporation
Second Pioneer Corporation
First Plus Insurance Agency, Inc.
Latin American Agribusiness Development Corporation
L.A.A.D. Americas, S.A.
L.A.A.D. Caribe, S.A.
L.A.A.D. De Centroamerica, S.C.
L.A.A.D. Marketing Company, Inc.
SEMCO Services, Inc.
SWQ Holdings, Inc.
Southeast Acquisition Company
First National Bank in Palm Beach
(F/K/A: Palmer FNB&T Co. of Sarasota)
Southeast Bank, National Association
700 Island Way Management Co., Inc.
62nd Street, Inc.
13899 Biscayne Blvd, Inc.
Amber Real Estate Holdings, Inc.
Bluehill Corporation
Chas. Corp.
Country, Inc.
Court House Center, Inc.
Cumberland Real Estate Co. of Fort Lauderdale, Inc.

Derf, Inc.
Derf Millpond, Inc.
Getaway Bay Development Co., Inc.
Jedi, Inc.
Jenbank, Inc.
Juana Corp.
Lochey Corp.
MFC, Inc.
McDoel Hotel, Inc., The
Melvin Limited, Inc.
Metro Center, Inc.
Misty, Inc.
Oak Winds Management, Inc.
Overage, Inc.
Qualls, Inc.
SEFC Building Corporation
S.E.T.L.D. Co., Inc.
Southeast Bank Brokerage Service, Inc.
Southeast Bank Leasing Company
Southeast Credit Insurance Company
Southeast Mortgage Company
  Finger Lakes Development Corporation
  One Hundred Street, Inc.
  SEMCO Properties, Inc.
  UNIFICO, Inc.
Southeast Office Park IV, Inc.
Southeast SBIC, Inc.
Southeast Video Services, Inc.
Southern Land Holding Company, Inc.
Sylvan Properties, Inc.
Tara Holdings, Inc.
V.W.S. Development Company, Inc.
Valentine Investments, Inc.
Valmal, Incorporated
Vero Capital Company
Western Hospitality, Inc.

Southeast Bank of West Florida
    Oro Boychik, Inc.
Southeast Credit Insurance Agency, Inc.
Southeast Merchant Banking Corporation
Southeast Properties, Inc.
Southeast Switch, Inc.
Southeast Venture Capital, Ltd. I
Southeast Venture Capital, Ltd. II

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
RULE 29.1 LISTING	ii
OPINIONS BELOW	1
JURISDICTION	1
STATEMENT OF THE CASE	1
A. Factual and Procedural Background	2
B. Petitioner's Timely Objections and The District Court's Order and Final Judgment	5
C. The Court of Appeals' Opinion	6
REASONS FOR GRANTING THE WRIT	6
I. INTRODUCTION AND SUMMARY OF ARGUMENT	6
II. THE MATURE AND GROWING SPLIT IN THE CIRCUITS	8
A. The Split In The Circuits	8
1. Third Circuit	9
2. Sixth Circuit	10
3. Seventh Circuit	12

PAGE

4. Ninth Circuit 13

B. The Conflicting Decisions Of The Fifth, Eighth, Tenth And Eleventh Circuits 14

C. Recent Developments in The Tenth Circuit Regarding Awards Of Attorneys' Fees To Class Counsel 14

D. Confusion Created By This Court's Decision In *Marino v. Ortiz* 16

III. THE APPLICATION OF THE RULE OF *GUTHRIE* DOES NOT COMPORT WITH DUE PROCESS 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

PAGE

Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30 (3rd Cir. 1971) 9, 10

Armstrong v. Board of School Directors, 616 F.2d 305 (7th Cir. 1980) 13

Bell Atlantic Corp., v. Bolger, 2 F.3d 1304 (3rd Cir. 1993) 2, 7, 9, 14, 17, 18

Bramon v. Barnett Banks, Inc., 38 F.3d 572 (11th Cir. 1994), *cert. denied*, U.S. S. Ct. 1824 (1995) 1

Camden I Condominium Ass'n v. Dunkle, 946 F.2d 768 (11th Cir. 1991) 6

Carlough v. Amchem Products, Inc., 5 F.3d 707 (3rd Cir. 1993) 2, 7, 10, 17

Concorde Resources, Inc. v. Woosley (In re Woosley), 855 F.2d 687 (10th Cir. 1988) 17

Cohen v. Young, 127 F.2d 721 (6th Cir. 1942) 11, 12

Croyden Assocs. v. Alleco, Inc., 969 F.2d 675 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993) 1, 2, 7, 12, 14, 17

Dosier v. Miami Valley Broadcasting Corp., 656 F.2d 1295 (9th Cir. 1981) 13

Gottlieb v. Wiles, 11 F.3d 1004 (10th Cir. 1993) 2, 7, 11, 14, 15, 17

Guthrie v. Evans, 815 F.2d 626 (11th Cir. 1987) ..... *passim*

Hall, et al. v. Southeast Banking Corp., et al., No. 90-0838 (S.D. Fla. 1990) 2

PAGE

In re Cement Antitrust Litigation, 688 F.2d 1297 (9th Cir, 1982) 13

In Re: Southeast Banking Corp. Securities Litigation, No. 90-0760 (S.D. Fla. 1990)..... 1

In Re: Southeast Banking Corp. Securities Litigation, 51 F.3d. 1003 (11th Cir. 1995)..... 1

Lindsey v. Normet, 405 U.S. 56 (1982).....17, 18

Loran v. Furr's/Bishop's Inc., 988 F.2d 554 (5th Cir. 1993).....2, 7, 14, 17

Marino v. Ortiz, 484 U.S. 301 (1988).....6, 11, 16, 17

Marshall v. Holiday Magic, Inc., 550 F.2d 1173 (9th Cir, 1977) 13

Martin v. Wilks, 490 U.S. 755 (1989)..... 19

Pacific R.R. v. Ketchum, 101 U.S. 289 (1879)..... 18

Research Corp. v. Asgrow Seed. Co., 425 F.2d 1059 (7th Cir. 1970) 12

Rosenbaum v. MacAllister, 64 F.3d 1439 (10th Cir. 1995) 2, 8, 15, 16

Sertic v. Carpenters District Council, 459 F.2d 579 (6th Cir. 1972) 10, 11

Shores v. Sklar, 844 F.2d 1485 (11th Cir. 1988), *cert. denied*, 493 U.S. 1045 (1990)..... 1

Shults v. Champion Int'l Corp., 35 F.3d 1056 (6th Cir. 1994) 2, 7, 11, 14, 17

Silber v. Mabon, 957 F.2d 697 (9th Cir. 1992)...2, 7, 13, 17

Tryforos v. Icarian Development Co., S.A. 518 F.2d 1258 (7th Cir. 1975), *cert. denied*, 423 U.S. 1091 (1976)1988)..... 12

PAGE

United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993) 17

VMS Limited Partnership Securities Litigation, 976 F.2d 362 (7th Cir. 1992) 2, 7, 13, 17

Walker v. City of Mesquite, 858 F.2d 1071 (5th Cir. 1988).....2, 7, 14, 17

Warth v. Seldin, 422 U.S. 490 (1975) 17

Wiener, et al. v. Southeast Banking Corp., et al., No. 90-0760 (S.D.Fla. 1990)..... 2

Statutes and Rules

28 U.S.C. § 1291 18

Federal Rule of Civil Procedure 23 .....*passim*

Federal Rule of Civil Procedure 23.1 .....*passim*

Federal Rule of Civil Procedure 24 .....*passim*

Treaties

James W. Moore & John E. Kennedy, MOORE'S FEDERAL PRACTICE (2d ed. 1992) 17

Herbert B. Newberg, NEWBERG ON CLASS ACTIONS (2d ed. 1985)..... 7

Charles A. Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE (2d ed. 1986)..... 7, 18

OPINIONS BELOW

The opinion of the Eleventh Circuit, App. at 1a-2a,[1] is reported at 51 F.3d 1003 (11th Cir. 1995). The Order and Final Judgment of the District Court, App. at 3a-11a, is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 1995. A timely petition for rehearing and a suggestion for rehearing *en banc* were denied on July 19, 1995. App. at 12a-13a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case presents again substantially the same issue that was before the Court last term in *Bramon v. Barnett Banks, Inc.*, 38 F.3d 572 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 1824 (1995), two terms ago in *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993), and five terms ago in *Shores v. Sklar*, 844 F.2d 1485 (11th Cir. 1988), *cert. denied*, 493 U.S. 1045 (1990). This split in the Circuits is obviously not resolving itself, and is now both wider and more mature than a year ago.

In those cases and in this case, the issue was whether in a Rule 23(b)(3) class action—absent intervention pursuant to Federal Rule of Civil Procedure 24—an unnamed class member who follows the procedures set forth by the district court in a Rule 23(e) notice regarding the filing of written objections and then appears through counsel before the district court to press those objections has standing to appeal the district court's approval of the settlement over those objections. Below, the Eleventh Circuit, in conflict with the Third, Sixth,

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[1] Citation to "App. at __" refers to the appendix to this petition.

Seventh and Ninth Circuits, and in accordance with the Fifth, Eighth, and Tenth Circuits, ruled that such a litigant lacked standing to appeal.[2] This split among no less than eight circuits is mature and growing. This Court should act now to resolve this split in authority regarding the application of the class action rules it promulgated. *See Shults v. Champion Int'l Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3rd Cir. 1993); *Bell Atlantic Corp., v. Bolger*, 2 F.3d 1304 (3rd Cir. 1993); *VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992); *Silber v. Mabon*, 957 F.2d 697 (9th Cir. 1992). *Compare Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop's, Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987).

A. Factual and Procedural Background

This action[3] arises from a final Order of the United States District Court for the Southern District of Florida, approving the settlement of a Rule 23(b)(3) securities class action for $5 million (the "Settlement") brought on behalf of certain purchasers of stock of Southeast Banking Corporation ("South-

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[2] As discussed more fully below, the Tenth Circuit has modified its position on this issue since the District Court's ruling in this case to a position which supports Petitioner. *See Rosenbaum v. McAllister*, 64 F.3d 1439 (10th Cir. 1995).

[3] On or about March 22, 1990, a class action pursuant to Rule 23(b)(3) alleging violations of federal securities laws was commenced against Southeast Banking Corporation and certain of its officers and directors in the United States District Court for the Southern District of Florida, entitled *Harvey Wiener, et al. v. Southeast Banking Corp., et al.*, No. 90-0760 (S.D. Fla.). Five days later, on or about March 27, 1990, a second securities class action entitled *William J. Hall, et al. v. Southeast Banking Corp., et al.*, No. 90-0838 (S.D. Fla.), was filed in the District Court. The two actions were consolidated as one class action entitled *In Re: Southeast Banking Corp. Securities Litigation*, No. 90-0760 (S.D. Fla.). This petition arises from the consolidated actions.

east") (the "Class") and awarding Class Counsel 25% of the $5 million settlement fund, plus disbursements. It is black letter law that the action could not have been settled without affording both notice and an opportunity to be heard to Petitioner and the other absent class members. *See* Fed. R. Civ. P. 23(c)(2) & (e).

The fact that the action was brought pursuant to Rule 23(b)(3) is determinative of the issue presented to this Court. Class actions pursuant to Rule 23(b)(1) & (2) can be settled without affording absent class members notice of the settlement and an opportunity to be heard. *See* Fed. R. Civ. P. 23(c)(2). Rule 23(b)(3) class actions and Rule 23.1 shareholders derivative actions can be settled *only* on adequate notice of the settlement to absent class members and providing them the opportunity to be heard regarding its adequacy. Accordingly, class members in Rule 23(b)(1) & (2) actions need to intervene pursuant to Rule 24 if they wish to appear before a district court for any purpose. Here, the Petitioner was summoned to the District Court regarding the proposed settlement by order of the District Court. In Response to the District Court's order Petitioner timely filed written objections to the settlement and appeared through counsel at the settlement hearing before the District Court to press those objections.

The District Court was obliged to hear Petitioner's objections pursuant to Rules 23(c)(2) & (e). After having heard Petitioner's objection, the District Court "rubber stamped" the proposed settlement by signing a judgment prepared by Class Counsel without any modifications. Petitioner timely appealed.

In dismissing the appeal, the United States Court of Appeals for the Eleventh Circuit concluded pursuant to *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), that Petitioner William A. Brandt, Jr., as Administrator of the Investment Plus Plan (the "Plan"), a pension plan for former employees of Southeast and its affiliates, who appeared below in response to the District Court's ordered notice on behalf

of more than 5,000 Plan beneficiaries, who are also class members, and vigorously objected to the award of attorneys' fees and disbursements, lacked standing to appeal the District Court's order approving the settlement and awarding $1.25 million in attorneys' fees.

Class Counsel entered into a proposed settlement with Defendants on or about August 20, 1993, without the benefit of any substantive discovery. The proposed settlement defined the class as follows:

> The "Class" and "Class Members" mean all persons who purchased or otherwise acquired Southeast Securities during the Class Period (based upon transaction date), including their spouses, heirs, executors, *administrators*, successors and assigns, if any. . . .

(App. at 21a) (emphasis added). The Settlement stipulation required that notice be given to all class members. The Settlement stipulation further required Class Counsel to publish in papers of general circulation a summary notice approximately one week following the mailing of the notice to all class members.

On August 27, 1993, the District Court signed a preliminary order approving the Settlement and requiring notice to the class members. The Order with Respect to Notice, Settlement Hearing and Administration provided in pertinent part:

> Any Class Member who does not elect to be excluded may appear at the Settlement Hearing in person or by Counsel, if an appearance is filed and served as hereinafter provided, and may be heard to the extent allowed by the Court in support of, *or in opposition to, the fairness, reasonableness and adequacy of the proposed Settlement, the requested awards of attorneys' fees and reimbursement of expenses . . . provided, however, that no person shall be heard in opposition to the proposed Settlement and the judgment to be entered thereon, or to the requested awards of attorneys' fees and reimbursement of expenses, unless, on or before 15 days before the*

> *[Settlement hearing] such person: [files with the court a notice of intention to appear] together with a statement that indicates the basis for such opposition along with any supporting documentation.*

(App. at 55a-56a.)[4]

On or about October 12, 1993, Class Counsel submitted a joint petition for an award of attorneys' fees (the "Fee Petition") to the District Court seeking $1,250,000—25% of the $5 million common fund—in attorneys' fees, and reimbursement for expenses in the amount of $98,579.95. Aside from summaries, general conclusory statements and the resumes of Class Counsel, the Fee Petition provided no evidence as to the reasonableness of Class Counsel's Fees.

B. Petitioner's Timely Objections and The District Court's Order and Final Judgment

On November 1, 1993, Petitioner on behalf of the more than 5,000 Class Members, who are beneficiaries of the Plan and comprised more than 10.5% of the total plaintiff class, filed a Notice of Intention to Appear at the Settlement Hearing to Oppose Class Counsel's request for Attorneys' Fees and Reimbursements for Expenses. (App. at 58a-60a.) The same day, the Petitioner also filed a Memorandum of Law strenuously opposing Class Counsel's request for Attorneys' Fees and Disbursement for Expenses. (App. at 61a-71a.) On November 15, 1993, the Petitioner through counsel appeared at the Settlement Hearing pursuant to the District Court's ordered notice and vigorously objected to Class Counsel's request for Attorneys' Fees and Disbursement for Expenses. In fact the transcript of the settlement hearing is fifty-seven pages long—thirty-one of which deal almost exclusively with the Petitioner's objections to Class Counsel's Fee Application.

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[4] Neither in the Class Notification nor at any other time during the proceedings in district court did class counsel notify the class members that to preserve their rights to appeal they had to formally intervene pursuant to Federal Rule of Civil Procedure 24.

On November 23, 1993, the District Court signed an order prepared by class counsel approving the Settlement, including the requested attorneys' fees and disbursements. The Petitioner timely appealed the District Court's Order on the grounds that (1) no evidentiary basis existed for the District Court's award of attorneys' fees and expenses, and (2) the District Court failed to follow the Eleventh Circuit's mandate in *Camden I Condominium Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 775 (11th Cir. 1991) (holding that an award of attorneys' fees must be reasonably calculated by the district court, who must articulate and identify all factors upon which it relied and explain how each factor affected the fees awarded).

C. The Court of Appeals' Opinion

On May 9, 1995, the Eleventh Circuit dismissed the appeal, holding that as an unnamed class member who did not intervene, the Petitioner lacked standing to appeal the District Court's order on attorneys's fees. The sole authority cited by the Court is *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), in which the court denied standing to a dissenting class member of a Rule 23(b)(2) class action who was not afforded the opportunity to object and made no attempt to intervene under Rule 24. Instead, the dissenting class member participated in the action by filing an appeal from the district court's entry of final judgment. The court in *Guthrie* held that because of his failure to intervene, the appellant, a member of a class of inmates challenging the conditions of their confinement at a state prison, had no standing to appeal. 815 F.2d at 628.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Although an adverse judgment is appealable only by the parties to a lawsuit, *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (per curiam), the issue of whether an unnamed *but timely objecting member* of a Rule 23(b)(3) class action may appeal

the district court's approval of the settlement and/or that part of the settlement relating to attorneys' fees remains unsettled. The two leading treaties on federal practice support the axiom that a class member who appears before the district court and objects to a settlement has standing to appeal an adverse ruling. *See* James W. Moore & John E. Kennedy, 3B MOORE'S FEDERAL PRACTICE ¶ 23.80, at 496 (2d ed. 1992) ("A member of a class who appears in response to the court's notice . . . and objects to the [settlement] has a right to appeal from an adverse final judgment although he did not become a formal party of record."); Charles A. Wright, *et al.*, 7B FEDERAL PRACTICE AND PROCEDURE § 1797, at 360-61 (2d ed. 1986) ("Of course, if the class member appears in response to the notice and puts forth his objections, he can attack the dismissal or compromise on appeal from the entry of the final judgment."); *See also* Herbert B. Newberg, 1 NEWBERG ON CLASS ACTIONS § 1.08, at 13-14 (2d ed. 1985) ("Certainly class members are parties for purposes of being subject to a binding judgment or for purposes of objecting to and appealing from an order approving a class settlement . . . .").

The views of the commentators notwithstanding, the Fifth, Eighth, Tenth and Eleventh Circuits,[5] in direct conflict with the Third, Sixth, Seventh and Ninth Circuits,[6] have ruled that an unnamed class member lacks standing to appeal an order approving a settlement. More recently, the Tenth Circuit revisited its rule that an unnamed class member lacks standing to appeal the approval of a settlement agreement at least insofar as an award of attorneys' fees is concerned. *See*

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[5] *See, e.g., Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop's, Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1991); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987).

[6] *See, e.g., Shults v. Champion Int'l Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3d Cir. 1993); *Bell Atlantic Corp., v. Bolger*, 2 F.3d 1304 (3d Cir. 1993); *VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992); *Silber v. Mabon*, 957 F.2d 697 (9th Cir. 1992).

Rosenbaum v. MacAllister, 64 F.3d 1439, 1443 (10th Cir. 1995). In *Rosenbaum*, the Tenth Circuit exacerbated the split in the circuits by ruling that, while an unnamed class member who timely objected at the settlement hearing before the district court without formally intervening lacks standing to challenge on appeal the approval of that settlement agreement, that same class member "has standing to appeal the district court's award of attorneys fees and expenses to the plaintiffs' attorneys." *Id.*

Regrettably, none of the decisions[7] focus on the "bright line" between (a) Rule 23(b)(1) & (2) class actions, which can be settled without affording class members notice and an opportunity to be heard, and (b) Rule 23(b)(3) & 23.1 class and shareholder derivative actions, which cannot be settled absent such notice and hearing. *See* FED. R. CIV. P. 23(c)(2) & (e).

The split among the Circuits destroys geographic uniformity in this important area of federal procedural law. In addition to thwarting the substantive rights of many litigants, the inconsistencies in the Circuits leave unnamed class members without a clear sense of their rights and thus calls for the adoption of a uniform rule. For all these reasons, *certiorari* is warranted.

II. THE MATURE AND GROWING SPLIT IN THE CIRCUITS

A. The Split In The Circuits

As stated above, the principle that an unnamed party, who has timely objected at the district court level has standing to appeal an order approving a settlement has been the subject of much debate in the Circuits. None of the decisions compare the fundamental differences between Rule 23(b)(1) & (2) class actions as opposed to Rule 23(b)(3) and 23.1 class and shareholder derivative actions, which cannot be settled without notice to absent class members and provision of a hearing on their objections, if any, to the proposed settlement.

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[7] Cited in footnotes 5 and 6, *supra*.

1. Third Circuit

It is well-settled in the Third Circuit that an unnamed class member has the right to appeal all aspects of a settlement agreement, including attorneys' fees. In *Ace Heating & Plumbing Co. v. Crane Co.*, the court held that unnamed class members had standing to appeal a settlement in a nationwide Rule 23(b)(3) class action antitrust case, even though the appellants had not objected in the district court and could have excluded themselves from the settlement. 453 F.2d 30, 32 (3d Cir. 1971). The Third Circuit stated that "ordinarily, aggrieved class members may appeal any final order of a district court in proceedings held pursuant to Rule 23. *Id.* Furthermore, the court observed that the right to be excluded is often illusory where class members' claims would be too small to litigate unless aggregated, and concluded that a right to appellate review was necessary to guard against unfair settlements. *Id.* at 33.

In *Bell Atlantic Corp. v. Bolger*, the Third Circuit discussed at length the current split in the Circuits on whether an objecting member of a class or derivative litigation[8] lacks standing to appeal a settlement agreement, and held that a shareholder in a derivative suit, who failed to intervene, but did object to the settlement agreement in district court, had standing to appeal the order approving the settlement. 2 F.3d 1304, at 1307-09.

The court concluded that "assuring fair and adequate settlements outweigh concerns that non-intervening objectors will render the representative litigation 'unwieldy.' It is sufficient that the [party] attended the settlement hearing and voiced before the district court the same objections he now raises before us on appeal." *Id.* at 1310.

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[8] As in a Rule 23(b)(3) action, Federal Rule of Civil Procedure 23.1 also requires that to satisfy due process, unnamed shareholders in a shareholder derivative suit must be given notice of any dismissal or compromise, and such notice "must be sufficiently informative and give sufficient opportunity for response." *Bell Atlantic Corp.*, 2 F.3d at 1317 (quoting *Kyriazi v. Western Elec. Co.*, 647 F.2d 388, 395 (3d Cir. 1981)).

More recently, in *Carlough v. Amchem Products, Inc.*, the Third Circuit, affirming the rule in *Ace Heating*, held that unnamed class members in a Rule 23(b)(3) action would be able to appeal from the district court's final approval or disapproval of any settlement of action and, thus, they could not appeal denial of intervention under the collateral order doctrine. 5 F.3d 707, 713-14 (3d Cir. 1993).

Therefore, it is well established in the Third Circuit that an unnamed class member who objects to a settlement agreement has standing to appeal all aspects of the agreement, including attorneys' fees.

2. Sixth Circuit

The Sixth Circuit also adheres to the same axiom. In *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942), the Sixth Circuit did not require intervention as a predicate to appeal by an unnamed class member. In *Cohen*, an unnamed class member in a Rule 23(b)(3) secondary class action, challenged a final judgment approving and adopting a settlement agreement. The unnamed class member had both appeared at the hearing to oppose the settlement and moved to intervene in the action. The motion to intervene was denied and the unnamed class member did not contest it. The class member did, however, appeal the district court's order approving the settlement. The Sixth Circuit held that an unnamed class member who had objected to a proposed settlement was "entitled as of right to prosecute the appeal." *Cohen*, 127 F.2d at 724.

In *Sertic v. Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972), the Sixth Circuit concluded that unnamed class members of a Rule 23(b)(3) whose petitions to intervene had been denied by the district court, had standing to appeal the settlement agreement. The court stated the case fell "almost squarely within our decision in *Cohen v. Young*." *Id.* at 581. The Sixth Circuit further noted:

> The only relevant distinction between the present case and *Cohen* lies in the omission of the District Court

> herein to notify the members of the class of the proposed orders and to afford them opportunity to present any adverse claims thereto. If such notice was not required in the present case, we would be forced to conclude that appellant was never in the position of a 'defendant who is summoned by process of court' and therefore has no standing to bring the appeal. Notice was, however, required.

Id.

In *Shults v. Champion Int'l Corp.*, 35 F.3d 1056 (6th Cir. 1994), the court held that "because *Sertic* and *Cohen* remain good law, *Gottlieb's* apparent reading of [*Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987)], that intervention is a necessary prerequisite . . . for an unnamed class member to have standing to appeal, see [*Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993], is thus not controlling on this circuit." The Court then stated:

> In brief, a non-named class member has standing to appeal a settlement order if he has formally intervened in the action (indeed, non-parties generally obtain such standing upon intervention). However, a non-named party that has not been permitted to intervene may also have standing to bring a direct appeal if a motion to intervene, which is then appealed, should have been granted. *A nonnamed party may also have standing to appeal if the district court has otherwise 'summoned' him into court.* Of course, as the Supreme Court has indicated, 'the better practice is . . . to seek intervention for purposes of appeal."

Id. at 1061 (quoting *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (emphasis added.) We again point out that in the settlement of Rule 23(b)(3) and 23.1 class and shareholder actions all absent class members are required to be "summoned into court" as part of the settlement approval process. FED. R. CIV. P. 23(e). That is not true of Rule 23(b)(1) and (2) class actions.

3. Seventh Circuit

The Seventh Circuit was one of the first circuits to hold that an unnamed class member has standing to appeal an adverse ruling if the class member objected below.

In *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059, 1060-61 (7th Cir. 1970), unnamed Rule 23(b)(3) class members appealed an order approving a settlement in an antitrust action. The appealing class members, however, were not only unnamed class members, but they also failed to object at the settlement hearing. The Seventh Circuit dismissed the appeal and held that if a "class member intervenes or even appears in response to a notice pursuant to [Federal Rule of Civil Procedure] 23(e) and *objects* to the dismissal or compromise, *he has a right to appeal from an adverse final judgment*. . . . However, . . . a person in disagreement with the terms of the settlement must take, at least, these minimal steps to preserve his right to appeal." *Id.* (emphasis added) (citations omitted.)

Some courts have erroneously read a discrepancy in *Asgrow's* language as requiring not only an objection, but also intervention by an unnamed class member that seeking appeal. *See Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 679 (8th Cir. 1992). The *Asgrow* court, in a footnote stated that it "need not consider the factual questions concerning the degree of participation by appellants in the settlement hearing and negotiations since the failure of appellants formally to intervene, after receipt of notice under Rule 23(e) before judgment forecloses their right to appeal." *Asgrow*, 425 F.2d at 1060, n.2. Several factors, however, indicate that the language in the body of the *Asgrow* opinion should control. First, the Asgrow appellees raised this point to show the appellants' acquiescence in the settlement; they did not argue they had met the court's appearance requirement. *Id.* Second, the body of the text cites *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942), with approval. Finally, the *Asgrow* holding was affirmed by Seventh Circuit in *Tryforos v. Icarian Development Co., S.A.*, 518 F.2d 1258, 1263 n.22 (7th Cir. 1975), *cert. denied*, 423 U.S. 1091 (1976) (holding that a unnamed party who appears

and presents objections has standing to appeal), in *Armstrong v. Board of School Directors*, 616 F.2d 305, 327 (7th Cir. 1980) ("an unnamed class member who appears in response to a Rule 23(e) notice and objects to settlement has right to appeal from adverse judgment."), and in *VMS Limited Partnership Securities Litigation*, 976 F.2d 362, 368 (7th Cir. 1992) (affirming the *Asgrow* holding, but holding that *Asgrow* would not apply to an appeal of a post-settlement order implementing the settlement agreement). *See also Armstrong v. Board of School Directors*, 616 F.2d 305, 327 (7th Cir. 1980) (*citing Asgrow* for the proposition that "an unnamed class member who appears in response to a Rule 23(e) notice and objects to a settlement has a right to appeal from an adverse judgment.").

4. Ninth Circuit

The Ninth Circuit has also established that an unnamed class member has standing to appeal a settlement agreement. In *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir, 1977), the Ninth Circuit held that unnamed Rule 23(b)(3) class members have standing to appeal an order approving a settlement simply because their rights were being adjudicated. *Id.* at 1176. *See also In re Cement Antitrust Litigation*, 688 F.2d 1297, 1309 *aff'd* 459 U.S. 1191 (1983) (9th Cir, 1982) (an unnamed "class member may appeal from an order approving a settlement to which the member objects"); *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981) (unnamed class member who objected to settlement "could have challenged it by direct appeal").

More recently, in *Silber v. Mabon*, 957 F.2d 697, 699-700 (9th Cir. 1992), the court held that generally, as long as an unnamed Rule 23(b)(3) class member appears in response to a notice of hearing of proposed settlement "and puts forth his objections, he can attack the dismissal or compromise on appeal from entry of the final judgment." *Id.* (citations omitted.)

B. The Conflicting Decisions Of The Fifth, Eighth, Tenth And Eleventh Circuits

The holdings of the cases above are in direct conflict with decisions of the Fifth, Eighth, Tenth and Eleventh Circuits. *See Gottlieb v. Wiles*, 11 F.3d 1004, 1007 (10th Cir. 1993) (citing the Eleventh Circuit's decision in *Guthrie* for the proposition that an unnamed class member who has not intervened lacks standing to appeal); *Loran v. Furr's/Bishop's Inc.*, 988 F.2d 554, 554 (5th Cir. 1993) (court lacks jurisdiction to consider appeal by class member who has not intervened below); *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 680 (8th Cir. 1992) (holding that an unnamed class member who objected at the settlement hearing but did not intervene lack standing to appeal); *Walker v. City of Mesquite*, 858 F.2d 1071, 1073 (5th Cir. 1988)[9] (concluding that unnamed class members could not appeal from a consent decree).[10]

C. Recent Developments In The Tenth Circuit Regarding Awards Of Attorneys' Fees To Class Counsel

To further exacerbate the conflict among the Circuits, on August 15, 1995, the Tenth Circuit revisited its rule previ-

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[9] In contrast to the Petitioner here, the appealing class members in *Walker* did not object during the settlement hearing. Instead they attempted to intervene during the appeal process after the final judgment was entered and, thus, did not participate at all in the proceedings in district court. 858 F.2d at 1075.

[10] The courts have not made a distinction between class actions and derivative suits for purposes of determining the prerequisites to standing to appeal. For example, in *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1307-08 (3d Cir. 1993), which was a shareholder derivative action, the court freely interchanges class actions and derivative suits in its discussion of standing to appeal. The court stated that "it is not settled whether an objecting member of the class or derivative litigation who is not a named party may appeal the court's approval of the compromise." *Id. See Schults v. Champion International Corp.*, 35 F.3d 1056, 1059 (6th Cir. 1994) (in class action, court cites, *Bell Atlantic Corp.*, in its discussion of standing). *See also* Note 8, *supra*.

ously affirmed in *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993) that an unnamed class member absent intervention has no standing to appeal a district court's approval of the settlement agreement in a class action. In *Rosenbaum v. MacAllister*, 64 F.3d 1439 (10th Cir. 1995), a case involving both a shareholder's derivative suit under Rule 23.1 and a Rule 23(b)(3) class action, the Tenth Circuit stated: "The purpose of Rule 23 and class actions generally, is to unify and render manageable litigation in which there are many members of a homogeneous class with common claims against a defendant. . . . These Rule 23 requirements in part are for the benefit of the defendant to allow it to settle in one suit its liability to all members of the class who have not opted out." *Id.* at 1442. The court further stated that to allow a nonintervening class member to appeal the approval of a settlement, would permit one individual to delay any benefits that may accrue to the class as a result of the settlement. *Id.*

The Tenth Circuit, however, held that "to allow an individual dissident class member, who did not intervene, to appeal an attorney's fee award would not be nearly as disruptive." *Id.* On the contrary, the court concluded should the dissident's appeal succeed in reducing those fees, there would be additional funds for the later distribution to the class members. *Id.* Further, the court noted that the strength of the representation afforded to the class by the named class members is most likely to break down in the context of evaluating the award of fees to the named class members' attorneys. *Id.* The unnamed class members are in a superior position to evaluate the propriety of the fees awarded to the attorneys chosen by the named class members, as the unnamed class members may take an unbiased look at the representation provided by the attorneys. *Id.* Thus, the Tenth Circuit held that a "nonintervenor class member and shareholder who made written and oral objections at the fee hearing, has standing to appeal the court's award of attorneys fees and expenses to the plaintiffs' attorneys." *Id.* at 1443.

The Tenth Circuit's holding in *Rosenbaum* supports the Petitioner's position, and is in direct conflict with the Eleventh Circuit's holding below denying Petitioner's standing to appeal the district court's order on attorneys' fees.

D. Confusion Created By This Court's Decision In *Marino v. Ortiz*

Some of the Circuits cite *Marino v. Ortiz*, 484 U.S. 301 (1988), for support of the rule that an unnamed class member must properly intervene to have standing to appeal a district court order approving a settlement agreement to which they timely objected. Their reliance is misplaced.

In *Marino*, this Court was faced with an appeal from a final hearing approving a consent decree in settlement of a Rule 23(b)(2), an action brought under Title VII of the Civil Rights Act of 1964. The action was brought on behalf of Black and Hispanic police officers. The settlement provided injunctive relief, which was why Rule 23(b)(3) was not implicated. The petitioners, White officers, challenged the class settlement notwithstanding the fact that they were *neither* class members *nor* parties to the underlying lawsuit in any way. *Id.* at 304. This Court ruled "that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Id.* (citations omitted).

However, this quote has been taken out of context to support the principle that unnamed Rule 23(b)(3) class members must intervene in addition to objecting timely in order to have standing to appeal. Support for such a principle cannot be found in *Marino* because this Court was concerned about whether a *nonparty* has standing to appeal, not whether an absent Rule 23(b)(3) class member has standing to appeal a settlement of which he had notice and to which he timely objected in the district court. Furthermore, as shown above (1) prior to *Marino*, the Circuits were split on whether an unnamed class member, absent intervention, has standing to challenge a district court's approved settlement agreement and/or that part of the settlement involving attorneys' fees,

and (2) presently, the Circuits are more divided than before *Marino*. *See Shults v. Champion Int'l Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3rd Cir. 1993); *Bell Atlantic Corp., v. Bolger*, 2 F.3d 1304 (3rd Cir. 1993); *VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992); *Silber v. Mabon*, 957 F.2d 697 (9th Cir. 1992). *Compare Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop's, Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987).

III. THE APPLICATION OF THE RULE OF *GUTHRIE* DOES NOT COMPORT WITH DUE PROCESS

The Eleventh Circuit's application of the rule of *Guthrie* in this case, does not comport with the Petitioner's Constitutional rights. "The right to prior notice and hearing is central to the Constitution's command of due process." *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 500 (1993). Nowhere in the Settlement Notice sent to all absent class members does it state that an unnamed class member must not only timely object in writing but also intervene for the purpose of preserving his or her right to appeal should the District Court not address adequately his objections. In addition, at the Settlement Hearing in which the Petitioner strongly objected to the disputed fees and expenses, neither the District Court nor Class Counsel raised the issue of intervention.

"When an appeal is afforded . . . it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet*, 405 U.S. 56, 77 (1982) (citations omitted). "The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). A party aggrieved by a final order of

the district court has standing to appeal such order. *Concorde Resources, Inc. v. Woosley (In re Woosley)*, 855 F.2d 687, 687-88 (10th Cir. 1988). "Although the determination of injury may not always be simple, standing to appeal is recognized if the appellant can show an adverse effect of the judgment . . .." Wright, *et al.*, 15A FEDERAL PRACTICE AND PROCEDURE § 3902, at 63 (2d ed. 1986).

28 U.S.C. § 1291 permits appellate jurisdiction to the courts of appeals from "all final decisions of the district courts," and it is firmly established that parties to a suit have an appeal as of right from an adverse decision of the district court. *Id.* In a non-class action proceeding, however, a settlement to which the parties agreed will never give rise to an "adverse decision" because the parties have all acquiesced to the compromise. Wright, *et al.*, 15A FEDERAL PRACTICE AND PROCEDURE § 3902, at 91-92 ("Parties who have consented to entry of a judgment at times are said to lack standing to appeal, and occasionally appeals from consent judgments are simply dismissed. The true principle at work, however, is one of waiver or consent; the appropriate disposition, if the appeal represents no more than a retroactive attempt to undo consent properly given, is affirmance rather than dismissal.") (*citing Pacific R.R. v. Ketchum*, 101 U.S. 289, 295 (1879)).

In a Rule 23(b)(3) class action, as the one at issue here, or in a Rule 23.1 shareholder derivative action, however, there is a strong chance that a settlement to which named parties have agreed will result in a sort of "adverse decision" to unnamed, non-negotiating parties. *See Bell*, 2 F.3d at 1310 ("In seeking court approval of their settlement proposal, plaintiffs' attorneys and defendants' interest coalesce and mutual interest may result in mutual indulgence. The parties can be expected to spotlight the proposal's strengths and slight its defects."). Thus, where an appellate court grants review to named parties, while denying standing to unnamed Rule 23(B)(3) or Rule 23.1 class members, would effectively violate the unnamed party's rights to seek review of an "adverse decision." *See Lindsey*, 405 U.S. at 77.

This Court has held that a "judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of *strangers* to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (emphasis added.) While the Court has recognized an "exception" for situations where the non-party is otherwise adequately represented, *Id.* at 762 n.2, only through an appeal and a substantive review of the district court's decision can an appellate court determine whether an unnamed Rule 23(B)(3) or Rule 23.1 class member has become a stranger *vis-a-vis* the settlement. To impose any other approach—like the one in *Guthrie*—would severely impair the due process rights of unnamed class members, whose timely and meritorious objections may be overlooked by a district court and ignore the teaching of the Federal Rules and the overwhelming case law.

CONCLUSION

For the reasons stated above, and to eliminate the split in the circuits, this Court in this case should grant Certiorari.

Respectfully submitted,

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